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DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER 00-0410

SALES TAX

For Tax Periods: 1997-1998

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1. Sales and Use Tax – Public Transportation Exemption

Authority: IC 6-2.5-3-2(a), IC 6-2.5-5-27, IC 6-8.1-5-1 (b), *Shoup Buses, Inc. v. Indiana Department of Revenue,* 635 N.E.2d 359 (Ind.Tax 1994), *National Serv-All, Inc., and National Serv-All, Inc., d.b.a. Zent's v. Indiana Department of State Revenue, 644 N.E.2d 956* (Ind. Tax 1994), *Continental Grain Company v. Wilber Followell*, 475 NE2d 318 (Ind. App. 1985), *Panhandle Eastern Pipeline Company and Trunkline Gas Company v. Indiana Department of State Revenue,* 74 N.E. 2d, (Ind. Tax 2001).

The taxpayer protests the disallowance of its use of the public transportation exemption.

2. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b)

The taxpayer protests the imposition of the penalty.

Statement of Facts

After an audit for the tax years 1997 and 1998, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales tax, interest and penalty. The taxpayer protested the assessment and a hearing was held. More facts will be provided as necessary.

1. Sales and Use Tax – Public Transportation Exemption

Discussion

The taxpayer provides its clients with dumpsters that the clients fill. The taxpayer then transports the dumpsters with contents to landfills for disposal of the contents. The taxpayer charges one

fee for this service. Most of the taxpayer's clients are in the construction business. Therefore, the dumpsters are predominately used to store, transport and dispose of construction debris and waste. The department assessed use tax on the tangible personal property that the taxpayer used in providing this service pursuant to IC 6-2.5-3-2(a).

The use of tangible personal property is exempt from the use tax "if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property." IC 6-2.5-5-27. The taxpayer contends that the use of the property assessed in the audit qualifies for exemption as directly used in providing public transportation for property.

All departmental tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b). Further, exemptions from tax must be strictly construed against taxpayers. *Shoup Buses, Inc. v. Indiana Department of Revenue*, 635 N.E.2d 359 (Ind.Tax Court 1994).

The Indiana Tax Court considered the public transportation exemption in the cases *National Serv-All, Inc., and National Serv-All, Inc., d.b.a. Zent's v. Indiana Department of State Revenue*, 644 N.E.2d 956 (Ind. Tax 1994) and *Panhandle Eastern Pipeline Company and Trunkline Gas Company v. Indiana Department of State Revenue*, 74 N.E. 2d, (Ind. Tax 2001). In the *National Serv-All* case, the petitioner claimed the public transportation exemption from the gross retail and use tax for equipment used in hauling and disposing of household garbage. The court stated that to be involved in public transportation and eligible for the public transportation exemption, a carrier must transport property belonging to others. *Id*. 956. The petitioner in that case did not demonstrate that it was predominately involved in the public transportation of property belonging to others. Therefore, it did not qualify for the public transportation exemption. In the *Panhandle Eastern* case, a gas company qualified for the public transportation exemption because its pipelines were predominately used to transport gas belonging to others.

The taxpayer's use of certain equipment would be exempt if the taxpayer is engaged in public transportation. As the court stated in the *National Serv-All* case, the taxpayer can only be engaged in public transportation and eligible for the public transportation exemption if it is transporting property belonging to others. Therefore, it must be determined whether the construction debris that the taxpayer transported belonged to the construction clients or to the taxpayer.

The taxpayer contends that pursuant to a contract, the construction clients owned the construction debris until it was actually disposed of in the dump. In Indiana, it is settled law that a contract indicates that meeting of the minds of the parties on certain essential elements of an agreement. Whether or not there was a meeting of the minds indicating the intent to enter a contract is a question of fact that is to be determined by the facts and circumstances of the situation. The party claiming that a contract exists has the burden of proving that the contract exists. *Continental Grain Company v. Wilber Followell*, 475 N.E.2d 318 (Ind. App. 1985).

In support of its contention that the parties agreed by contract that the construction contractors owned the construction debris which the taxpayer transported, the taxpayer submitted "Exhibit A," a pink sheet of paper which appears to be the final page of a multi page invoice or other

form. This sheet lists six statements each beginning with the phrase "customer agrees. . ." These statements concern the types of materials to be placed in the bins and disposed of, warrants that the debris is not hazardous waste as defined by state or federal law, responsibility for the construction debris during storage and transportation, responsibility for damage caused by the roll-off containers, payment for services and setting jurisdiction and venue for any legal action. The taxpayer's name, address and telephone number is typed on this form. There is, however, no signature or any other indication that the customers have agreed to these terms. Without any evidence of assent on the part of the client, "Exhibit A" alone is not a contract. Therefore there is no written agreement determining the ownership of the construction debris.

In the *National Serve-All* case, also, there was no written enforceable contract between the homeowners and the garbage disposal company. The Court determined that without a written agreement, the other incidents of ownership of the household garbage would be considered to determine the ownership of the household garbage. *Ibid. 958-959.* The household garbage was of no value to the homeowners after National Serv-All picked it up. Further, after the household garbage was picked up, National Serv-All controlled the household garbage. These incidents of ownership, without a written contract, indicated that National Serv-All owned the garbage after it was picked up and during the transportation to the dump.

The construction clients are like the homeowners without a written contract with National Serve-All in the *National Serve-All* case. The construction debris is of no value or use to the clients after the taxpayer picks it up. The taxpayer controls the construction debris during the process of transporting it to the dump. Absent at least a written contract reserving ownership of the construction debris to the construction clients and/or other indicia indicating the reservation of ownership, the construction debris becomes the property of the taxpayer when the taxpayer picks it up.

Although the taxpayer was given adequate opportunity, the taxpayer never produced additional documentary evidence that the construction clients actually retained ownership during the transportation process. The taxpayer did not sustain its burden of proving that it qualified for the public transportation exemption to the use tax.

Finding

The taxpayer's protest is denied.

2. Tax Administration – Penalty

Discussion

The taxpayer's final point of protest concerns the imposition of the ten per cent negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

> "Negligence", on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence.

The audit assessed use tax on purchases in addition to those under protest. For example, the taxpayer failed to pay retail sales tax or remit use tax on many administrative items used in the office. The taxpayer breached its duty to pay the proper taxes to the state.

Finding

The taxpayer's final point of protest is denied.

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